92-795

No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

Larry Pounds,
Petitioner,

vs.

David Griepenstroh, Hugh Barclay,
and **Spencer County, Indiana,**
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THEODORE LOCKYEAR
JAMES A. KORNBLUM
LOCKYEAR & KORNBLUM
555 Sycamore Street
Post Office Box 3515
Evansville, Indiana 47734-3515
Telephone: (812) 422-1199

FRANK R. HAHN
CHAPMAN & HAHN
315 State Street
Post Office Box 664
Newburgh, Indiana 47629-0664
Telephone: (812) 858-9455

Counsel for Petitioner

November 4, 1992

QUESTIONS PRESENTED

1. Is the United States Court of Appeals for the Seventh Circuit in conflict with the decision of the Supreme Court in *Anderson v. Creighton,* 483 U.S. 635 (1987), and in conflict with other federal courts of appeals, by holding that a constitutional right is not "clearly established" unless a nearly identical case has been decided, and by granting qualified immunity in practically every case of first impression to officials who violate constitutional rights?

2. Is the United States Court of Appeals for the Seventh Circuit, by focusing its inquiry in patronage dismissal cases on the potential of the public office in question to be politicized, even wrongfully, rather than on the legitimate public purpose of the office itself, in conflict with the decision of the Supreme Court in *Branti v. Finkel,* 445 U.S. 507 (1980)?

3. Does the decision of the United States Court of Appeals for the Seventh Circuit, reversing the trial court and granting qualified immunity to the defendants Commissioners of Spencer County, Indiana, for the political discharge of a County Veterans Service Officer, conflict with the decisions of the Supreme Court in *Anderson v. Creighton,* 483 U.S. 635 (1987) and in *Branti v. Finkel,* 445 U.S. 507 (1980)?

LIST OF PARTIES

The following persons and entities were parties to the proceedings in the Court of Appeals for the Seventh Circuit:

Plaintiff-Appellee Larry Pounds, who is the petitioner in this court; Defendants-Appellants David Griepenstroh, Hugh Barclay, Louis Lubbehusen, and Spencer County, Indiana, all of whom but Louis Lubbehusen are respondents in this court. Louis Lubbehusen died in December, 1991 and a Notice and Suggestion of Death of Louis Lubbehusen was filed in the District Court on July 10, 1991. No motion for substitution of his personal representative has been made.

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No.

In The

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October Term, 1992

Larry Pounds,

Petitioner,

vs.

David Griepenstroh, Hugh Barclay,
and **Spencer County, Indiana,**

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, a politically discharged county Veterans Service Officer, petitions this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in *Larry Pounds v. David Griepenstroh, et al.*, Cause No. 91-2372, on the 6th day of August, 1992. The Judgment reversed the decision of the United States District Court for the Southern District of Indiana.

OPINIONS BELOW

The decision of the Seventh Circuit is reported at 970 F.2d 338, and is reprinted in the Appendix at page 1. The decision of the district court, denying the motion of the respondent Commissioners for summary judgement of dismissal on grounds of qualified immunity, is unreported. The memorandum opinion of the district court is reprinted in the Appendix at page 12.

JURISDICTION

The judgment to be reviewed was entered on August 6, 1992. No petition to rehear the judgment was filed. This court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment to the Constitution of the United States provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or

> enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Facts:

The petitioner Larry Pounds had served as county Veteran's Service Office [VSO] for Spencer County, Indiana, continuously since 1983, in successive one-year appointments. *Pounds v. Griepenstroh,* 970 F.2d 338, 339 (7th Cir. 1992) (App. 1, 2). The appointment of VSO's at the municipal level in Indiana is optional with local executive bodies. Ind. Code § 10-5-1-11. VSOs, if appointed, serve under the supervision of the state director of veterans' affairs, and are subject to the same regulations as employees of the Indiana department of veterans' affairs. *Id.*

The non-political function of VSO's, and other employees of the Indiana department of veterans' affairs[1] in January, 1989, was

> ". . .to do such acts at the request of any veteran of the armed forces, or his or her spouse, surviving spouse or dependents, which shall be necessary or reasonably incident to obtaining or endeavoring to obtain for the person so making such request any advantage, benefit or emolument accruing, due or believed to be accruing or due to such person under any law of the United

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[1] In January, 1989, the department was denominated the "veterans' state service department." Indiana P.L. 3-1989, § 236, effective May 5, 1989, renamed the department and made stylistic, not substantive, changes in wording in the section.

> States, the state of Indiana or any other state or government by reason of the service of such veteran in the armed forces of the United States."

Ind. Code §§ 10-5-1-3 (a). The Department is administered by the Veteran's Affairs Commission, a bi-partisan panel of four appointed by the governor, no more than two of whom may be of the same political party. The commission establishes rules and regulations for the department and makes general administrative policies. Ind. Code §§ 10-5-1-7 and 10-5-1-8. *Pounds*, 970 F.2d at 339.

In January, 1989, with the election of two new members to the County Board of Commissioners, the commissioners voted not to reappoint Pounds as VSO. When Pounds learned of his impending dismissal and remonstrated, he was told by one of the commissioners, in the presence of the others, that the decision to replace him as VSO was "one hundred and ten percent politics." 970 F.2d at 340, n. 1 (App. 4), *Pounds v. Griepenstroh, et al.*, No. EV 89-35-C (S.D. Ind. June 27, 1991) Memorandum Opinion pages 4-5 (App. 12, 13). Pounds filed suit in District Court pursuant to 42 U.S.C. § 1983, alleging that he had been dismissed as county VSO because he was a Republican. 970 F.2d 339 (App. 1), Memorandum Opinion, page 2, (App. 4).

The district court correctly found that party affiliation with the county commissioners could not be necessary or appropriate for the performance of the duties of VSO, because VSOs are supervised by the Veteran's State Service Officer and not by the commissioners who appoint them. Although the commissioners had voted to require the VSO to present monthly reports to the commission, and to maintain fixed office hours, the district court found that "[n]one of these activities require party affiliation for the effective performance of the position. . . [or] provide the Commissioners with any substantive authority over the performance of the duties of the Veteran's Service Officer." Memorandum Opinion, page 3 (App. 12).

Proceedings Below

The respondents filed a motion for summary judgment based in part on the defense of qualified immunity. The district court denied the summary judgment motion because the respondents did not demonstrate that party affiliation is necessary to the effective performance of a VSO. 970 F.2d at 339 (App. 1), Memorandum Opinion, pages 2-4 (App. 12, 14). Pursuant to *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) the respondents took an interlocutory appeal. The Court of Appeals for the Seventh Circuit reversed.

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S *PER SE* TEST RESULTS IN A FINDING OF QUALIFIED IMMUNITY IN PRACTICALLY EVERY CASE OF FIRST IMPRESSION, IN CONFLICT WITH THE DECISION OF THIS COURT IN *ANDERSON V. CREIGHTON*, 483 U.S. 635 (1987), AND WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEALS.

In *Anderson v. Creighton*, 483 U.S. 635 (1987) this court said, unequivocally, that official actions are not protected by qualified immunity merely because "the very action in question" has not yet been held unlawful. *Anderson*, 483 U.S. at 640, citing *Mitchell*, 472 U.S. at 535, n. 12. In the Seventh Circuit, however, it is the norm to extend qualified immunity to public officials in all but the most egregious cases, unless a prior court decision has condemned the precise official act in question. Writing for a unanimous Seventh Circuit panel in the decision below, Coffey, J., recognized the Seventh Circuit's general disinclination to follow *Anderson*:

> "[I]t is difficult to imagine how many plaintiff, under *Anderson*, could have a clearly established right to be free from patronage dismissal unless a

> nearly identical case had already been decided. *Cf. Greenberg v. Kmetko*, 922 F.2d 382, 385-86 (7th Cir. 1991) (Cudahy, J., concurring) ('[T]he law of qualified immunity, as it has developed in this circuit, has tended to find qualified immunity in almost any case of first impression.')"

970 F.2d at 341 (App. 7).

It appears that in the Seventh Circuit, ". . . the level of generality at which the relevant 'legal rule' is to be identified," *Anderson, supra,* at 639, in political discharge cases is that of nearly complete factual congruity. Not only does this interpretation of *Anderson* amount to a clear misapplication of that decision, but also it is in conflict with decisions of other federal courts of appeals. Only in the Seventh Circuit has the level of generality at which a constitutional right must be established in order to be *clearly* established, *Anderson,* at 639, been set at that of almost completely corresponding facts.[2] The "One Bite" Rule has no application in First Amendment political firing actions. For this Court to allow such a result to stand in this case would render impotent prior decisions of this Court and well reasoned decisions of other circuits.

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[2] In *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), this court left open the question of when a constitutional right has become so clearly established that a public official cannot claim qualified immunity for violating it. 457 U.S. at 818, n. 32. The circuits are not unanimous as to the scope of decisional authority to which to look to determine when a constitutional right has become clearly established for qualified immunity purposes. The Seventh Circuit, although requiring close factual congruity in the decisions, looks to relevant decisions of all courts of appeals and district courts in the absence of an authoritative pronouncement by the Supreme Court. *Williams v. Anderson,* 959 F.2d 1411, 1415 (7th Cir. 1992). The Sixth Circuit, for example, looks first to ". . . binding precedent from the Supreme Court, the Sixth Circuit, or from [the trial court] itself." *Ohio Civil Service Employee's Association v. Seiter,* 858 F.2d 1171, 1177 (6th Cir. 1988). Decisions of other courts, to be considered authoritative by the Sixth Circuit, ". . . must both (continued)

See, *e.g.*, *Shabazz v. Coughlin*, 852 F.2d 697, 701 (2d Cir. 1988) (the absence of specific authority directly on point will not preclude a finding that the law was clearly established); *Bennis v. Gable*, 823 F.2d 723, 733 (3rd Cir. 1987) (no requirement of absolute factual identity); *Tarantino v. Baker*, 825 F.2d 772, 775 (4th Cir. 1987) (some actions must be held unconstitutional even if no reported case involves identical circumstances); *Danese v. Asman*, 875 F.2d 1239, 1244 (6th Cir. 1989) (the very action in question is not the test); and *Hannula v. City of Lakewood*, 907 F.2d 129, 131 (10th Cir. 1990) (substantial correspondence must be demonstrated between the conduct in question and prior law).

II. CIRCUIT LAW OF THE SEVENTH CIRCUIT CONFLICTS WITH THE DECISIONS OF THIS COURT IN *BRANTI V. FINKEL*, 445 U.S. 507 (1980) AND IN *ELROD V. BURNS*, 427 U.S. 347 (1976) BY DENYING FIRST AMENDMENT PROTECTION FROM PATRONAGE DISMISSAL TO PUBLIC EMPLOYEES WHOSE OFFICES, EVEN IN DEROGATION OF LEGITIMATE PUBLIC PURPOSE, THEORETICALLY COULD BE POLITICIZED.

The Seventh Circuit has observed that

> ". . . between the strictly menial government worker (who under *Elrod* and *Branti* is completely protected from patronage firing) and the policymaking/confidential assistant (whose

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(footnote continued) point unmistakenly to the unconstitutionality of the conduct and be so clearly foreshadowed by applicable direct authority as to leave no doubt [that the] conduct was unconstitutional." *Cagle v. Gilley*, 957 F.2d 1347, 1348 (6th Cir. 1992). *Cf.* Kinports, *Qualified Immunity In Section 1983 Cases: The Unanswered Questions*, 23 Ga. L. Rev. 597, 605-06, n. 41 (1989).

> protection from patronage firing is nonexistent), there is a range of government positions for which the propriety of patronage firing has depended largely upon the courts' juggling of competing constitutional and political values."

Upton v. Thompson, 930 F.2d 1209, 1213, rehearing denied 938 F.2d 84 (7th Cir. 1991). In the decision to be reviewed, the Seventh Circuit recognizes that, as such balancing is done in the Seventh Circuit, "[a] plaintiff has little chance of winning a case of first impression unless she occupies an extremely high or low rung on the bureaucratic ladder." 970 F.2d at 341 (App. 7). *Anderson*, of course, makes clear that if "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates the right," 438 U.S. at 638, the defense of qualified immunity will fail, notwithstanding that the precise act in question has not previously been held unlawful. Yet as circuit law in the Seventh Circuit has developed, public officials who abusively discharge government workers for patronage reasons, except from "strictly menial" jobs, need not fear loss of their qualified immunity unless the precise positions that they target (or ones very nearly the same) have already been judicially determined to be nonpolitical.

Even so, the decision to be reviewed goes further. It makes any public office fair game for patronage if it is even *possible* for the appointing authority to turn its performance to political advantage. The petitioner's job, as county VSO, was at the lowest level in the statutory scheme in Indiana for the provision of veterans' services. He was supervised not by the commissioners who appointed him, but by a state official (appointed by the governor), who reports to a bipartisan commission. The sole nexus of this position to the commissioners, other than hiring, is that the commissioners can eliminate it, or support it to a greater or lesser extent with funding and office space. If the commissioners should decide to increase funding for the position, however, it is the state director of veterans' affairs, not the commissioners, who will determine how the VSO will use the money. Ind. Code 10-5-1-11.

The rationale of the Seventh Circuit for its holding[3] that Indiana county VSOs such as the petitioner were not clearly exempt from patronage dismissal in 1989 has implications far beyond this case for the meaning and application of the Seventh Circuit's *per se* test for qualified immunity:

> "County VSOs in Indiana report to state officials and follow their policies, but they also must look to the county commissioners for funding, office space, *and, most importantly, appointment.* Moreover, county VSOs provide aid to local veterans, and it is *possible* that someone running for the elected position could make promises to the public, and in particular the veterans, as to how the allocated funds will be used in social programs. When elected, the commissioner has every reason to believe that the only way to fulfill these promises is to appoint a VSO with a similar ideology."

970 F.2d at 343 (App. 10, emphasis supplied).

Only by usurping Indiana's statutorily provided structure for regulating veterans' services at the local level could the commissioners arrogate to themselves a political interest in controlling the manner in which the Spencer County VSO does his job. Therefore, the decision to be reviewed strongly supports

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[3]The Seventh Circuit relied on *Savage v. Gorske*, 850 F.2d 64 (2d Cir. 1988) (applying New York Law) for an answer to the "key question," 970 F.2d at 343 (App. 8-9) of the commissioners' reasonable belief that Pounds could be fired. New York has a scheme to for providing services to veterans at the local level, but there is a significant difference from Indiana Law. In New York, the state Veterans' Service Agency that supervises VSOs is comprised predominately of state department heads, who are political appointees of the governor. N.Y. Executive Law §§ 350, 357, 358 (McKinney 1981).

the proposition that even positions where incumbents are typically subject to termination only for cause, such as schoolteacher, *Guerra v. Roma Independent School District,* 444 F.Supp. 812 (S.D.Tex. 1977), or building inspector, *Dyke v. Otlowski,* 154 N.J.Super. 377, 381 A.2d 413 (1977), become patronage positions by definition if the appointing authority chooses to politicize them.

The standard for the evaluation of a public employee's right to be free from patronage dismissal is established in *Branti v. Finkel,* 445 U.S. 507 (1980):

> "[T]he ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."

445 U.S. at 518. The focus of the analysis mandated by *Branti,* however, is not whether a public office is *capable* of being politicized, but whether party affiliation is an appropriate requirement for its effective performance.

An objectively reasonable public official must evaluate the political sensitivity of a public job at an objectively reasonable level of generality, *Anderson,* 483 U.S. at 639. In the Seventh Circuit, this is the level at which "the position . . . authorizes, either directly or indirectly, meaningful input into government decision making on goals or their implementation." *Nekolny v. Painter,* 653 F.2d 1164, 1170 (7th Cir. 1981), cert. denied 455 U.S. 1021 (1982). In the decision to be reviewed, the Seventh Circuit has expanded the "meaningful input" concept of *Nekolny* to include any position in which the incumbent could be influenced by the appointing authority to administer the office in a politically partisan manner. The decision to be reviewed could grant qualified immunity in such cases, even where politicizing the job in question is inconsistent with its proper performance or, as in the case of county VSOs in Indiana, conflicts with public policy as expressed by state statute. Ind. Code §§ 10-5-1-3 and 10-5-1-5(a).

III. THE DECISION TO BE REVIEWED DEMONSTRATES THE NEED FOR THE SUPREME COURT TO RESOLVE "INCREASINGLY INTRACTABLE" PROBLEMS FACED BY THE COURTS IN APPLYING *ELROD* AND *BRANTI* TO MID-LEVEL PUBLIC OFFICERS WHO ARE VICTIMS OF WRONGFUL TERMINATION BECAUSE OF POLITICAL PATRONAGE.

The decision to be reviewed demonstrates the need for this court to resolve the question, raised by *Branti* of how to evaluate the political sensitivity of a public office for first amendment purposes. This is the problem noted by Justice Scalia in his dissent in *Rutan v. Republican Party of Illinois,* 497 U.S. 62, 110 S.Ct. 2729, 2746 (1990). It is on this point that the Seventh Circuit finds *Branti* to be "almost incurably vague" to begin with, and believes that cases involving *Branti* principles are thus becoming increasingly intractable." 970 F.2d at 341 (App. 7), quoting *Meeks v. Grimes,* 779 F.2d 417, 419 (7th Cir. 1985).

The Seventh Circuit decision creates political tension, which heretofore did not exist between the local councils or commissions upon whom they depend for their existence and pay, and the bipartisan State Department of Veteran's Affairs under the auspices and supervision of which they must work. For the local officials to politicize the VSO in the manner perceived, without evidence thereof, by the Seventh Circuit would permit the Indiana Code to be rendered meaningless by making the local authorities and not the State agency the "supervisors" of this important post.

To avoid replacement for cause, Indiana VSOs must perform to the reasonable satisfaction of their local appointing authorities even, apparently, to the displeasure of the state director of veterans' affairs. The latter, a political appointee of the governor, Ind. Code § 10-5-1-7, may be of the same or different political persuasion than the appointing authority. Citing *Savage, supra,* the Seventh Circuit found that Indiana VSOs are subject to patronage dismissal given

> "[T]he logical rationale [] that the VSO's discretionary choices concerning the budget

> objectives or goals for the county, or the executive's policy as to how and when, and for what, county funds should be spent. In such circumstances, the executive could logically believe that it was important that the VSO share the same political outlook."

970 F.2d at 342-43 (App. 9).[4] Whether to fund a VSO at the municipal level, and if so by how much, is a decision that state law in Indiana assigns to the political discretion of county and city executive bodies. Once established, the position itself functions only to assist veterans to gain access to entitlements. Ind. Code § 10-5-1-3. The appointing authority is specifically excluded from the supervisory structure. *Id.* By appointing and funding VSOs, local executive bodies thus make the political choice to use their local public resources, or not, to make entitlements more accessible to veterans. Congress and the state legislatures, however, make the political decisions to create and fund such entitlements, and to determine eligibility for them.

The petitioner submits that the decision to be reviewed not only was incorrectly decided by the Seventh Circuit, but also presents a factual and legal context that points out the need, and provides the opportunity, for the Supreme Court more precisely to define the application of *Elrod* and *Branti* to mid-level governmental officals.

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[4]The Seventh Circuit goes on to refer to *Kurowski v. Krajewski*, 848 F.2d 767, 770 (7th Cir. 1988), and *Tomczak v. City of Chicago*, 765 F.2d 633, 641 (7th Cir. 1985), for the proposition that political considerations may be appropriate for the appointment of officials who will operate autonomous once in office. That is a different question to whether *Elrod* and *Branti* permit the patronage dismissal of autonomous mid-level officials who already have been appointed, and are performing their jobs satisfactorily.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

THEODORE LOCKYEAR
JAMES A. KORNBLUM
LOCKYEAR & KORNBLUM
555 Sycamore Street
Post Office Box 3515
Evansville, Indiana 47734-3515
Telephone: (812) 422-1199

FRANK R. HAHN
CHAPMAN & HAHN
315 State Street
Post Office Box 664
Newburgh, Indiana 47629-0664
Telephone: (812) 858-9455

November 4, 1992

APPENDIX

In The
United States Court of Appeals
For the Seventh Circuit

No. 91-2732

LARRY POUNDS,

Plaintiff-Appellee,

v.

DAVID GRIEPENSTROH, HUGH BARCLAY,
and LOUIS LUBBEHUSEN,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Indiana, Evansville Division.
No. EV 89-35-C–Gene E. Brooks, *Chief Judge.*

ARGUED FEBRUARY 13, 1992–DECIDED AUGUST 6, 1992

Before COFFEY and FLAUM, *Circuit Judges,* and ESCHBACH, *Senior Circuit Judge.*

COFFEY, *Circuit Judge.* Larry Pounds, former Veteran's Service Officer (VSO) of Spencer County, Indiana, sued Spencer County and members of the Spencer County Board of Commissioners, alleging that the Board's decision not to reappoint him as VSO in 1989 was politically motivated, and therefore, violated his rights under the first and fourteenth amendments. 42 U.S.C. § 1983. The defendant commissioners moved for summary judgment on the ground of qualified immunity, but the district court denied the motion. We disagree with the trial court's finding and reverse, holding that the defendant commissioners are entitled to qualified immunity.

BACKGROUND

Indiana's Department of Veterans' Affairs assists veterans in obtaining "any advantage, benefit or emolument" to which they may be entitled. Ind. Code § 10-5-1-3(a). The Department is headed by the Veteran's Affairs Commission, a four-person group appointed by the governor and containing no more than two members of the same political party, which establishes rules and regulations for the Department and makes general administrative policies. Ind. Code § 10-5-1-5(a) and 10-5-1-6. The Director of Veterans' Affairs, also appointed by the governor, oversees the Department's daily operation and ensures that the policies of the governor and the Commission are carried out. Ind. Code § 10-5-1-7 and 10-5-1-8. The Director likewise supervises the county and city VSOs, though they are appointed by the local county commissioners or city council. Ind. Code § 10-5-1-11.

In Spencer County the VSO serves a one-year term at the pleasure of the County Board of Commissioners. The plaintiff was appointed VSO in 1981 and again in 1982, but resigned in September of that year. He was appointed again in mid-1983, and reappointed every year until 1989. On January 3, of 1989 the three-member Board, containing two recently-elected commissioners (defendants Lubbehusen and Griepenstroh), chose not to reappoint Pounds, and instead appointed Don Patmore to the position of Spencer County VSO. Pounds filed suit, alleging that the Board refused to reappoint him because he was not a Democrat, and that this deprived him of his right to free speech and association and equal protection.

The district court denied the defendants' summary judgment motion, finding that they were not entitled to qualified immunity because they had not demonstrated that political allegiance was essention in a VSO. As allowed by *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) the defendants have taken an interlocutory appeal from this ruling. We review this decision *de novo*. *Upton v. Thompson*, 930 F.2d 1209, 1211 (7th Cir. 1991).

DISCUSSION

In *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) the Supreme Court held that

> governmental officials performing discretionary functions[] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

This protection, known as qualified immunity, serves an important purpose.

> Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken with independence and without fear of consequences.

Id. at 819 (footnote and internal quotation marks omitted). Qualified immunity shields officials from the burdensome demands often imposed on those who must defend a lengthy lawsuit by requiring the right allegedly violated to have been clearly established at the time of the official's action. *Id.* at 818; *Siegert v. Gilley*, _____ U.S. ____, 111 S. Ct. 1789, 1799-94 (1991). The rationale is that "[i]f the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he be fairly said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818. A right is "clearly established" for qualified immunity purposes only where "the contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates the right," and "in the light of pre-existing law the unlawfulness [of the offical's acts was] apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Thus, where the law at the time of the act was not sufficiently developed to put the official on notice that his or her act would violate the plaintiff's statutory or constitutional rights, the official is immune from liability. This standard is high, but it serves the dual purposes of qualified immunity: it allows officials to carry out their duties confidently, without fear of incurring unexpected liability, and it allows courts to dispose of insubstantial claims prior to trial, sparing officials from unnecessary litigation. The standard is objective, based on what a reasonable official would or should have known and thought in the same circumstances, given the state of the law at that time. *id.* at 639.

In this case Pounds contends that the defendants violated his right to be free from politically motivated employment decisions when they refused to reappoint him as county VSO because he was not a Democrat.[1] Generaly, a public employee cannot be fired or subjected to other adverse employment decisions solely for political reasons. *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507, 518 (1980); *Rutan v. Republican Party of Illinois*, _____ U.S._____, 110 S. Ct. 2729, 2756 (1990). There is an exception to this rule where "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[2] *Branti*, 445 U.S. at 518. Party affiliation is an appropriate job requirement where

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[1] As evidence of the defendants' political animus, Pounds stated in his deposition that when he asked commissioner Lubbehusen whether the reason for the Board's decision was "one hundred and ten percent politics" Lubbehusen replied, "Yes, you're a big boy, you ought to understand that." Pounds Dep., at 148.

[2] This language raises an interesting issue as to who bears the burden of proof in qualified immunity cases involving patronage dismissals. *Branti's* reference to what "the hiring authority can demonstrate" indicates that the defendant official bears the burden of proving that political allegiance

(Footnote continued on following page)

"the position held by the individual authorizes, either directly or indirectly, meaningful input into government, decisionmaking on issues where there is room for principled disagreement on goals or their implementation." *Nekolny v. Painter*, 653 F.2d 1164, 1170 (7th Cir. 1981). Given these standards, the question we must answer is: Could the defendants, in light of what they knew about the duties and powers of a county VSO and the law at the time, have reasonably believed that they could refuse to reappoint Pounds solely because of his political affiliation?

Initially, we review the powers and duties of a county VSO, as the functions performed by an official often determine whether he plays a role in setting or implementing policy. Our inquiry is limited to the powers inherent in the office itself;

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[2](continued) was essential to the plaintiff's effective performance. On the other hand, our cases state that, in order to defeat, a claim of qualified immunity, the plaintiff bears the burden of pointing to analogous cases establishing that the constitutional right claimed to have been violated was clearly established. *Rakovich v. Wade*, 850 F.2d 1180, 1209 (7th Cir.) (en banc), *cert. denied*, 488 U.S. 968 (1988); *see also Upton v. Thompson*, 930 F.2d 1209, 1212 (7th Cir. 1991); *Abel v. Miller*, 824 F.2d 1522, 1534 (7th Cir. 1987). Thus, there is a shifting burden of proof under these circumstances. Initially, the plaintiff must allege the violation of some constitutional right. *Siegert*, _____ U.S. at _____, 111 S. Ct. at 1793-94. Next, the plaintiff must attempt to demonstrate that the right is clearly established by referring the court to analogous cases that would have put the defendants on notice that their acts were illegal. Finally, the defendants must respond to the plaintiff's argument by proving, through prior decisions or otherwise, that they could reasonably have believed that their acts were constitutionally permissible, either because the plaintiff's right was not so clearly established that the unlawfulness of their acts was apparent, or because political allegiance actually was a legitimate job requirement in the particular case.

we are not interested in whether or not a particular occupant may have turned the office into a political one. *Upton*, 930 F.2d at 1214; *Hudson v. Burke*, 913 F.2d 427, 431 (7th Cir. 1990). The Indiana Code reveals that VSOs are appointed by the county commissioners to "render service to the veterans of said county" and are paid from county funds. Ind. Code § 10-5-1-11. Although the statue describing county VSOs does not specifically delineate the meaning of the phrase, "render service to the veterans," the section creating the Department of Veterans' Affairs states that officers of the department including county VSOs,

> shall have full power and authority to do such acts at the request of any veteran of the armed forces, or his or her spouse, surviving spouse or dependents, which shall be necessary or reasonably incident to obtaining or endeavoring to obtain for the [veteran, spouse, or dependent] any advantage, benefit or emolument accruing, due or believed to be accruing or due to such person under any law of the United States, the state of Indiana or any other state . . . by reason of the service of such veteran in the armed forces of the United States.

Ind. Code § 10-5-1-3. County VSOs must have the same qualifications and adhere to the same rules and regulations as members of the state Department of Veterans' Affairs. They are supervised by the state Director of Veterans' Affairs. *Id.* The commisioners' decision of whether to employ a county VSO and how to fund the position is discretionary. Ind. Code § 10-5-1-11. The VSO, in turn, is invested with discretion in the use of the county's funds once appropriated.

Having outlined the powers of a VSO, we turn to the law at the time of the defendants' decision to determine whether it was clearly established that a government employee in Pounds's position could not be fired for political reasons. As Justice Scalia observed in his dissent in *Rutan, supra*, the law governing patronage dismissals after *Branti* is almost incurably vague. 'What [the *Branti* standard] means is any-

body's guess . . . [I]nterpretations of *Branti* are not only significantly at variance with each other; they are still so general that for most positions it is impossible to know whether party affiliation is a permissable requirement until a court renders its decision." *Rutan*, ____ U.S. at _____ 1110 S. Ct. at 2756; *see also Upton*, 930 F.2d at 1213 ("between the strictly menial government worker . . .and the policymaker/confidential assistant . . . there is a range of government positions for which the propriety of patronage firing has depended largely on the courts' juggling of competing constitutional and political values."); *Meeks v. Grimes*, 779 F.2d 417, 419 (7th Cir. 1985) "the problems faced by the courts in applying the [*Elrod/Branti*] formulation have become increasingly intractable.") The difficulty officials face in predicting whether a certain position is a proper target for political hiring and firing is the natural result of the myriad of governmental bodies, departments, and positions, and the varying responsibilities of public employees. *Meeks*, 779 F.2d at 419. Indeed, it is difficult to imagine how any plaintiff, under *Anderson*, could have a clearly established right to be free from patronage dismissal unless a nearly identical case had already been decided. *Cf. Greenberg v. Kmetko*, 992 F.2d 382, 385-86 (7th Circ. 1991) (Cudahy, J., concurring) "[T]he law of qualified immunity, as it has developed in this circuit, has tended to find qualified immunity in almost any case of first impression.")

This state of affairs injures both sides. A plaintiff has little chance of winning a case of first impression unless she occupies an extremely high or low rung on the bureaucratic ladder. *E.g., Tomczak v. City of Chicago*, 765 F.2d 633 (7th Cir. 1985) (second-highest official in Chicago Water Department subject to patronage dismissal because he helped establish and implement policies for allocating water—a sometimes testy political issue); *Meeks*, 779 F.2d at 420-21 (court bailiffs not subject to political dismissal because they did not set policy or have access to confidential information). By the same token, though, government officials are hard-pressed to predict who can be replaced for political reasons, and so may be dissuaded from reaping the full benefit of their victory at the polls and rewarding loyal supporters. Faced with such

uncertainty, it may be preferable to err on the side of caution and it might be well to find qualified immunity where we cannot confidently state that the right was clearly established or that the officials must have known their acts were proscribed by law. This is in line with the general principle that "public officials are entitled to immunity unless it has been authoritatively decided that certain conduct is forbidden." *Alliance to End Repression v. City of Chicago,* 820 F.2d 873, 875 (7th Cir. 1987).

Furthermore, Pounds had the burden to find closely analogous cases showing that his right was clearly established and has failed to do so. *Upton,* 930 F.2d at 1212; *Rakovich,* 850 F.2d at 1209. In fact, the only decisions concerning local VSOs (or their functional equivalent) are cited by the defendants. *Savage v. Gorski,* 850 F.2d 64 (2d Cir. 1988), a New York case, involved the First Deputy Service Officer of the County Veterans' Service Agency. The court held that the defendant County Executive could fire the officer for political reasons because his high salary, his contact with the public and veterans' organizations, and his power to interview veterans to determine their eleigibility for benefits all indicated that he could effect the implementation of the executive's policies, and so a shared ideology was a legitimate job requirement. *Id.* at 69. In *Wagner v. Hawkins,* 634 F. Supp. 751 (W.D. Ark. 1986) the chief executive officer of the county fired the VSO for political reasons. The court held that the chief executive was immune from liability for this action because the VSO met frequently with veterans concerning benefits issues and set goals and implemented policies with the chief executive's guidance, but primarily on his own. The court found that the VSO related to the county's chief executive much as a cabinet member relates to the governor, and therefore politics could be his undoing. *Id.* at 754.

The defendants claim these cases establish that the law in 1989 allowed them to reasonably believe they could appoint a new VSO based on ideology alone. After all, Pounds consulted with veterans and their families concerning benefits, filed reports with the commission, and essentially set his own goals and policies, some of which could be at variance with

those of the commissioners. In other words, he held a position where there was room for "principled disagreement on goals or their implementation" and thus was terminable under *Nekolny*. 653 F.2d at 1170. Pounds, however, maintains that these cases are irrelevant because New York and Arkansas have different statutory schemes than Indiana. This is true of *Wagner*, where the county executive set policies for the VSO and directly supervised him. The facts in *Savage*, however, are fairly analogous to those in the instant case. *Savage* involved New York law, which states that county VSOs serve at the pleasure of the county executive, but report to the state Veterans' Service Agency, N.Y. Executive Law, §§ 357 and 358 (McKinney 1981). This is identical to the situation in Indiana, where the defendants appointed Pounds but he answered to state officials. Moreover, the primary duty of New York VSOs is to assist veterans in their county in obtaining available benefits, education or rehabilitation. *Id.* Pounds did the same. Pounds, then, had much in common with the official in *Savage*, and the Second Circuit held that the VSO there was subject to patronage dismissal even though he actually implemented the policies of state officials rather than the county executive. Though the *Savage* court did not offer a lengthy explanation for its decision, the logical rationale is that the VSOs discretionary choices concerning the budget and office policy could reflect on the executive and even run counter to the executive's broad objectives or goals for the county, or the executive's policy as to how and when, and for what, county funds should be spent. In such circumstances, the executive could logically believe that it was important that the VSO share the same political outlook. *See Kurowski v. Krajewski*, 848 F.2d 767, 770 (7th Cir. 1988) (suggesting that an official can consider the politics of appointees, even when those appointees, e.g. a judge or a member of the FTC, will be independent of the official once ensconced in office); *Tomczak*, 765 F.2d at 641 (noting that provision of public services is often an election issue, and therefore an elected official with specific policies on the subject is entitled to pick employees with the same views where these employees have some autonomy in expanding or implementing the policy).

Thus, *Savage* allows us to answer the key question in qualified immunity cases: Given the particular facts and the existing law, could the defendants reasonably have believed that their actions would not violate the plaintiff's rights? The answer here is yes. County VSOs in Indiana report to state officials and follow their policies, but they also must look to the county commissioners for funding, office space, and, most importantly, appointment. Moreover, county VSOs provide aid to local veterans, and it is possible that someone running for the elected position of commissioner could make promises to the public, and in particular the veterans, as to how the allocated funds will be used in social programs. When elected, the commissioner has every reason to believe that the only way to fulfill these promises is to appoint a VSO with a similar ideology. The law in 1989 did not clearly forbid such an act; *Savage* indicated that it was allowable, and cases from this circuit stated that anyone who played a significant role in setting or implementing policy could be fired for politics. *Nekolny*, 653 F.2d at 1170. Thus, the contours of the right to be free from politically motivated employment decisions were not so definite in 1989 as to make the unlawfulness of the defendants' acts apparent, and we therefore hold that Griepenstroh, Barclay, and Lubbehusen are entitled to qualified immunity under *Harlow and Anderson*.

REVERSED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

LARRY POUNDS	)
Plaintiff	)
	)
vs.	) CAUSE NO. EV 89-35-C
	)
DAVID GRIEPENSTROH,	)
HUGH BARCLAY, LOUIS	)
LUBBENHUSEN, SPENCER	)
COUNTY, INDIANA	)
Defendants	)

ORDER

This matter comes before the Court upon Defendants' Motion for Summary Judgment.

The Court, being duly advised of the premises, hereby DENIES the Defendants' Motion for Summary Judgment.

IT IS SO ORDERED this *27th* day of *June*, 1991 at Evansville, Indiana.

S/ Gene E. Brooks

Gene E. Brooks, Chief Judge
U.S. District Court
Southern District of Indiana

cc: All counsel of record

MEMORANDUM

This matter comes before the Court upon Defendants' Motion for Summary Judgment. The plaintiff alleges that he was not reappointed "by virtue of the defendants' desire to place a Democrat as Veterans Service Officer and plaintiff's non-participation in the Democratic election process." (Complaint at 2). The defendants claim in this Motion for Summary Judgment that they should be accorded qualified immunity.

A non-policymaking, non-confidential public employee cannot be fired upon the sole ground of political beliefs. A policymaking or confidential employee can be fired on political grounds without violating the First Amendment. *Elrod v. Burns,* 427 U.S. 347 (1976) and *Branti v. Finkel,* 445 U.S. 507 (1980).

The plaintiff feels he was a non-policymaking employee and thus could not be fired for his political beliefs. The defendants do not admit Pounds was terminated for political reasons, rather he was terminated for other reasons – but believe in any case that Pounds was in a policymaking position and thus was excepted from the *Elrod* rule.

In determining whether a position falls under the protection of the *Elrod* rule, the ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position, rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved. *Branti* at 518. In order to make this determination, the Court must look at the nature of Pound's position.

A County Veteran's Service Officer "shall serve under the supervision of the Veterans' State Service Officer." IC 10-5-1-11 (1988). The County Veterans' Service Officer is not supervised by the County Commissioners who appoint him, but by the Veterans' State Service Officer. Therefore, party affiliation with the County Commissioners could not be necessary or appropriate to the performance of his duties. As the statue makes clear, party affiliation is not a necessary requirement for the effective performance of a County Veterans'

Service Officer. Defendants argue[1] the Spencer County Commissioners voted on 21 March 1983 to require the Veterans' Service Officer to maintain office hours from 8 to 4 and to present a monthly report. The Commissioners also discussed referring calls to the Auditor when he was out of the office. None of these activities require party affiliation for the effective performance of the position. The office hours and phone referrals are purely administrative issues; the reports merely evidence the Commissioners desire to be informed, they do not provide the Commissioners with any substantive authority over the performance of the duties of the Veterans' Service Officer.

Finally, defendants' argument that Pounds thought the Veterans' Service Officer position might be utilized for political purposes does not demonstrate the political affiliation was an appropriate requirement for the position. Neither do any of the other activities[2] argued by the defendants support this conclusion. The defendants are not entitled to qualified immunity.

The defendants indicate that even if the Court finds qualified immunity is not present in this case, it is their belief that they are entitled to summary judgment because the plaintiff

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[1] Defendants also argue this is a confidential position. Defendants misstate the concept of confidentiality: The confidences here are with the veterans served, not the Commissioners.

Defendants miscite *Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981) as defining "confidential position". The quoted passage, without a pinpoint cite, is part of the explanation of a policymaker.

[2] Defendants enumerate as other activities: changing office hours, transporting veterans to hospitals for payment contrary to State policy, nursing home visits, submitting a budget, transferring funds between accounts, exercising control over space in the courthouse, and setting annual goals.

has failed to meet an initial burden that his political affiliation was a substantial or motivating factor in the decision to terminate him. In *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274 (1977), the Supreme Court stated:

> Initially in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "subatantial factor", or to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board has shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

Mt. Healthy at 287 (footnote omitted). Therefore, Pounds has the initial burden of showing that his political affiliation was a substantial factor for his discharge.

Pounds states in his deposition:

> I said I was unaware until December 27th that there was any consideration of replacing me for any reason, and I asked the commissioners then, I said, "Do you have any complaints on me or reasons? Have you been told by anybody, had any one complaint, that I'm not properly doing my job, Mr. Barclay," and he said, "No, in fact I've had a lot of good comments on you." I said, "Mr. Griepenstroh, have you had any complaints," and he said, "No." I asked Mr. Lubbehusen and he said, "No." My answer to that was–and they kind of smiled–all three of them had smiles on their faces at the time they said it–I said, "In other words, the reason for relieving me must be a hundred and ten percent politics." I believe it

> was Mr. Lubbehusen who said, "Yes, you're a big boy, you ought to understand that."

Deposition of Larry Gilbert Pounds at 148. These statements are sufficient to meet the plaintiff's initial burden. After the plaintiff has met his initial burden, the Court must look at whether the Board has shown by a preponderance of the evidence that Pounds would have been terminated regardless of his political affiliation. The Court feels that while there does exist some evidence in the record that Pounds may have been terminated regardless of his political affiliation, the evidence does not rise to the level for the Court to find this as a matter of law. This determination must be made by the trier of fact.

The Court, for the reasons set forth above, hereby DENIES the defendants' Motion for Summary Judgment.

IT IS SO ORDERED this *27th* day of *June,* 1991 at Evansville, Indiana.

S/ Gene E. Brooks

Gene E. Brooks, Chief Judge
U.S. District Court
Southern District of Indiana

cc: All counsel of record